

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.

Id. (citation omitted). Further, this Court has appropriately noted that:

Amicus briefs filed by allies of litigants which duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief, are an abuse and should not be allowed. The term "amicus curiae" means friend of the court, not friend of a party.

DKT #1445 at 2 (citations omitted).

II. Argument

Under the *Ryan* test, the only possible ground for amicus curiae participation by the State of Arkansas would be that it "has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." However, a review of the State of Arkansas's Motion for Leave makes clear that it has no such information or perspective.

The State of Arkansas raises three grounds for its proposed amicus curiae participation. First, the State of Arkansas briefly outlines a (flawed) substantive argument that the forms of phosphorus found in poultry waste are not hazardous substances within the meaning of CERCLA. *See* Motion for Leave, ¶ 3. The Motion for Leave, however, *nowhere* identifies any unique information or perspective possessed by the State of Arkansas on this pure issue of law. In fact, the flawed arguments the State of Arkansas seeks to raise are ones that have already been raised by Defendants in the briefing on their motion for summary judgment. *See* DKT #1445 at 2 ("Amicus briefs filed by allies of litigants which duplicate the arguments made in the litigants'

briefs, in effect merely extending the length of the litigant's brief, are an abuse and should not be allowed") (citations omitted).

The second ground that the State of Arkansas raises as a basis for amicus curiae participation is that it is "troubled that the Court may make a ruling that conflicts with federal law." *See* Motion for Leave, ¶ 4. The State has, however, been unable to locate any authority supporting the proposition that a concern that a court might rule contrary to the way the amicus curiae views the law is a valid justification for amicus curiae participation.

The third and final ground that the State of Arkansas raises as a basis for amicus curiae participation is that it is "troubled that the Court may make a ruling that conflicts with . . . the environmental programs administered by the Arkansas Department of Environmental Quality ('ADEQ')." *See* Motion for Leave, ¶ 4. The Motion for Leave, however, *nowhere* sets out -- even in the most cursory manner -- how a ruling that the forms of phosphorus found in poultry waste are hazardous substances within the meaning of and for purposes of CERCLA might conflict with the ADEQ's environmental programs (which are nowhere even identified). Indeed, it is difficult to fathom that the ADEQ's environmental programs would in any way preclude the State of Oklahoma from recouping from Defendants response costs it has and will incur as a result of the releases of the forms of phosphorus found in poultry waste or from recovering from Defendants the natural resource damages resulting from such releases. In any event, however, such a program would be preempted. *See, e.g., Esso Standard Oil Company v. Perez*, 2005 U.S. Dist. LEXIS 818, *25 (D.P.R. Jan. 20, 2005) ("a state statute or regulation conflicting with the purpose of enforcement of any CERCLA provision might find itself preempted"); *United States v. City and County of Denver*, 100 F.3d 1509 (10th Cir. 1996) (holding that local zoning ordinances that conflict with CERCLA are preempted); *Fireman's Fund Insurance Co. v. City of*

Lodi, 302 F.3d 928, 943 (9th Cir. 2002) ("we hold that CERCLA permits both states and their political subdivisions to enact hazardous waste regulations and pursue additional remedies, *as long as those remedies do not conflict or interfere with "the accomplishment and execution of [CERCLA's] full purpose and objective . . ."*) (emphasis added) (citation omitted).

Simply put, aside from a bald, unsubstantiated and wholly uninformative assertion about its environmental programs, the State of Arkansas has identified no unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. As such, the State of Arkansas has utterly failed to carry its burden in establishing a valid basis for the Court to even consider allowing it to participate as an *amicus curiae*.³

III. Conclusion

WHEREFORE, premises considered, the "State of Arkansas's Motion to Request Leave to File an Amicus Brief in Support of Dismissing Oklahoma's CERCLA Claims Regarding Phosphorus" [DKT #1931] should be denied. Further, the State of Arkansas's proposed amicus brief [DKT #1932], which was inexplicably and improperly filed *prior to receiving leave* should not be considered and / or should be stricken.

Respectfully Submitted,

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³ In its Motion for Leave, the State of Arkansas also seeks leave to participate as an *amicus curiae* for "other[] [reasons] not fully addressed in this Motion." *See* Motion for Leave, ¶ 5. The purpose of a motion is to set forth the grounds entitling a party to the requested relief. To the extent they are not raised in the Motion for Leave, other purported but unarticulated reasons for the State of Arkansas's participation as an *amicus curiae* should not and cannot be considered.

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